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Supreme Court of the United States

October Term, 1970

No. ~~1768~~ 70-225

E. E. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
A. L. DRUCKER, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
E. B. DRUCKER, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
DAVID C. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK, and
R. E. SMITH, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,

Petitioners,

v.

GEORGE P. SHULTZ, SECRETARY OF LABOR (NOW JAMES D. HODGSON), UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
CONCISE STATEMENT OF CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	9

TABLE OF CITATIONS

Cases

Goldberg v. Whitaker House Co-op., 366 U.S. 28	7
Maryland v. Wirtz, 392 U.S. 183	6, 7
Rutherford Food Corp. v. McComb, 331 U.S. 722	7
Shultz v. Arnheim and Neely, Inc., ... F.Supp. ....., 61 L.C. Par. 32, 240 (W.D.Pa. 1969)	6
Walling v. Portland Terminal Co., 330 U.S. 148	7
Wirtz v. Barnes Grocer Co., 398 F.2d 718	6
Wirtz v. Columbian Mutual Life Ins. Co., 380 F.2d 903	6
Wirtz v. Hardin and Co., 253 F.Supp. 579	6, 8

Other Authority

Wage Hour Opinion Letter No. 1029 (September 12, 1969) 2 CCH Wages-Hours 4,983, Par. 30,581	9

Supreme Court of the United States

October Term, 1970

No. .....

E. E. FALK, Individually and as Partner
in Drucker & Falk,
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GEORGE P. SHULTZ, Secretary of Labor (now
JAMES D. HODGSON), United States
Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

The petitioners, E. E. Falk, individually and as a partner in Drucker &Falk, et al., pray that a writ of certiorari issue to review the opinion and judgment of the Fourth Circuit

Court of Appeals of the United States rendered in these proceedings on March 3, 1971.

OPINIONS BELOW

Fourth Circuit. The opinion of the Court of Appeals for the Fourth Circuit (App. A, *infra*, pp. 1-16) has not yet been reported in the official reports and is reported at 64 LC Par. 32,459 in the unofficial reports.

District Court. The opinion of the United States District Court for the Eastern District of Virginia (App. B, *infra*, pp. 17-28) is reported at 312 F. Supp. 608 (E.D. Va. 1970) in the official reports and at 62 LC Par. 32,297 in the unofficial reports.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) to review the opinion and order of the Fourth Circuit Court of Appeals entered on March 3, 1971.

QUESTIONS PRESENTED

Your petitioners are rental agents for 30 independent rental unit complexes located in the Cities of Hampton, Newport News, Norfolk, and Richmond. The projects admittedly have no relationship one to the other except for the fact that they employ the same rental agents to care for the premises and collect the rents. It is also admitted that the owners of the apartment projects would not be covered by the Fair Labor Standards Act if they did not use the services of Drucker & Falk. Questions presented here relate to whether the petitioners are covered under the enterprise amendments to the Fair Labor Standards Act. Those questions are:

1. Is a rental agent of various rental apartment projects, which have no relationship one to the other except a common rental agent, an enterprise within the meaning of the Fair Labor Standards Act? Phrased another way the question is whether an apartment owner, who is admittedly not covered by the Fair Labor Standards Act, comes within the Act's terms by the mere fact that the owner employs a rental agent who manages other rental apartments.

2. Under the Fair Labor Standards Act to be covered an enterprise must have an "annual gross volume of sales made or business done" of $500,000.[1] Is this figure to be measured by the gross rentals collected by the agent or by that agent's gross commissions?

3. Are maintenance workers employed at the buildings managed by petitioners employees of the apartment owner or of the petitioners?

STATUTORY PROVISIONS INVOLVED

This case involves the provisions of the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*, as amended by the Fair Labor Standards Amendments of 1966, 80 Stat. 830, together with the language of Section 3(s)(3) as it read prior to the 1966 amendments (75 Stat. 65, 66) as are reprinted in pertinent part in App. C, *infra*, pp. 21-31.

CONCISE STATEMENT OF CASE

This action was instituted by the Secretary of Labor on January 30, 1969, under Section 17 of the Fair Labor Standards Act of 1938, against the defendants who are partners in an apartment management firm called Drucker

[1] This is true for purposes of this litigation. Coverage now begins at $250,000.

& Falk. The matter was submitted to the United States District Court for the Eastern District of Virginia on pretrial order and stipulation of facts. On January 16, 1970, The Honorable Richard B. Kellam handed down his decision dismissing the complaint, finding for the defendants on all issues. The Secretary appealed to the Fourth Circuit who, on March 3, 1971, reversed the District Court and remanded the case for further proceedings not inconsistent with the views expressed in its opinion.

The activity of Drucker & Falk which is the catalyst for this case is its management of various apartment complexes within the State of Virginia. Drucker & Falk manages these apartments for various owners, the terms and obligations of that relationship being controlled by contract. Under this contract Drucker & Falk had two main obligations. The first was to lease and collect the rents for the apartment projects. As to this aspect the contracts varied in that they may call for Drucker & Falk to furnish the agents for this service and bear that cost or they may call for Drucker & Falk to merely supervise the personnel supplied by the owners, the owners bearing the cost. Where Drucker & Falk bore the cost of the clerical help, these employees were paid at the appropriate overtime rate and consequently there is no dispute as to these employees. In the situation where the owners of the project paid the clerical help, the employees were not paid overtime.

The other main obligation of Drucker & Falk was to operate and maintain the property within the budget set by the owners, the entire cost to be borne by the owners. Since the employees were deemed to be those of the owners, they were not paid overtime.

It was this failure of the owners to pay overtime in the above situations which led to the institution of this suit

against Drucker & Falk. Suit was not filed against the separate owners because it is admited that the Fair Labor Standards Act did not reach to any one individual owner. The only way the employees of the various projects managed by Drucker & Falk could come under the Fair Labor Standards Act is by virtue of the government's theory, i.e., Drucker & Falk is the employer of the project employees *and* that Drucker & Falk is an enterprise engaged in commerce. Thus, what the government could not accomplish by coming into the front door, it sought to do by coming in the back door. The petitioners contend that there is no rear entrance for the government as far as their building is concerned.

To carry out its contractual management duties Drucker & Falk employs various management employees, including six area managers, and various clerical employees and rental agents, all of whom are admitted by petitioners to be their employees. Drucker & Falk carries out the day-to-day operations of each project through a maintenance superintendent or project manager who, under the supervision of the area manager, is in charge of each project, and who supervises the maintenance employees. The only element which ties one apartment project to the other is the use of the same rental agent. As agent for the owner, Drucker & Falk works at his suffrage and at his direction.

As compensation for its services, the owners pay to Drucker & Falk a fixed percentage of the rentals collected. In no one apartment project managed by Drucker & Falk are the rentals greater than the statutory minimum, though if lumped together they are substantially in excess. Nor will the statutory minimum be met either by calculation of the individual commissions paid by each project to Drucker & Falk or by combining all those commissions together.

The District Court held that the employees in question were those of the owner, not Drucker & Falk; that the proper measure of business done was the gross commissions received; and that Drucker & Falk was not an enterprise. The Court of Appeals reversed each of these findings.

REASONS FOR GRANTING THE WRIT

By and large this case presents issues of first impression. Other than *Maryland* v. *Wirtz*, 392 U.S. 183 (1968) where the Court held the enterprise amendments constitutional, this Court has not passed on the enterprise clause. The government in this case is admittedly reaching for an expanded meaning for the enterprise concept.[2] Unable to bring the independent apartment owner within the Act (they were not even made a party defendant), the Secretary of Labor accomplishes what Congress has forbidden by suing the agent.

It is particularly compelling that the Court undertake review of this action. Congress did not labor over its definitions of "enterprise." Even a cursory glance at the opinions in this area shows an inordinate amount of reference to and interpretation of the Congressional history. *E.g. Wirtz* v. *Barnes Grocer Co.*, 398 F.2d 718 (8th Cir. 1968); *Wirtz* v. *Columbian Mutual Life Ins. Co.*, 380 F.2d 903 (6th Cir. 1967); *Wirtz* v. *Hardin and Co.*, 253 F. Supp. 579 (N.D. Ala. 1964) aff'd *per curiam*, 359 F.2d 792 (5th Cir. 1966).

The time has come when this Court should give the government and those affected by the Act some authoritative

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[2] About the time the government instituted suit in this case it was proceeding with its other test case, *Schultz* v. *Arnheim and Neely, Inc.*, ... F. Supp. ....., 61 LC Par. 32,240 (W.D. Pa. 1969). The instant case and *Arnheim* present the same issues. *Arnheim* was decided adversely to the rental agent and is now on appeal to the 3rd Circuit where it has been briefed and orally argued.

guidelines. The case presents an ideal vehicle for the Court in this regard. The issues are clean and the presence of an agent forces one to meet squarely the problems raised by the Act. In the context of this case the Court will be called upon to speak to the various elements constituting an enterprise, amplify the definition of sale, and define an employee in the agency context.

In the view of the petitioners the opinion of the Fourth Circuit deviates sharply from the decisions of this Court holding that the employer-employee relationship under the Act is tested by "economic reality" and not by the common law standards alone. *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722 (1946); *Goldberg* v. *Whitaker House Cooperative, Inc.,* 366 U.S. 28 (1961); *Walling* v. *Portland Terminal Co.;* 330 U.S. 148 (1946). In the instant case the services performed by the employees in question (1) are not a part of Drucker & Falk's business; (2) do not involve a permanent relationship with petitioners; (3) present Drucker & Falk with no opportunity to make a profit or incur a loss; and (4) represent no investment by Drucker & Falk in facilities or equipment. Only the common law tests can be satisfied.

Furthermore, the effect of the opinion of the Fourth Circuit is to flatly contradict the purpose of the enterprise amendments. As this Court stated in *Maryland* v. *Wirtz,* 392 U.S. 183, 188 (1968):

> Thus the effect of the 1961 change was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not enlarge the class of *employers* subject to the Act. (Emphasis in original)

Here the Fourth Circuit has not extended the Act to fellow employees, but rather, expanded the group of employers subject to the Act.

The view of the enterprise amendments taken by the Fourth Circuit also stands in sharp contrast to that of the Fifth Circuit in an analogous case, *Wirtz* v. *Hardin and Co.*, 253 F. Supp. 579 (N.D. Ala. 1964) aff'd *per curiam* 359 F.2d 792 (5th Cir. 1966). In *Hardin* the Court looked to the component parts (the two Piggly-Wiggly stores) of the alleged enterprise for a relationship. In the instant case the Fourth Circuit denies the relevancy or the necessity for doing that. Here the Court is merely content with looking at the unity of petitioners' internal operation.

Petitioners respectfully submit that the following results, which could flow from the opinion of the Fourth Circuit, are not consonant with the language of the Act or the intent of Congress.

1. By terminating its rental agent, the owner of an apartment project instantly avoids the coverage of the Fair Labor Standards Act.

2. That the petitioners' "gross volume of sales or business done" was not the services for which the owners bargained and which the petitioners sold, but rather the income from sales of property (rental space) which the petitioners did not own and in which they had no proprietary interest.

3. That when Congress defined an enterprise as a business with a "gross volume of sales made or business done" of $500,000, it had no intention to relate that test to what a business sells, but rather it meant to focus on what passes through the business.

4. That the intention of Congress was that the enterprise concept would be applied to various independent businesses which have no connection to each other save the fact that they employ the same rental agent whose internal structure is unified.

5. That an employer could be someone who meets only one of the seven tests of "economic reality" to determine the existence of an employee-employer relationship as set out by the Secretary in his Wage Hour Opinion Letter No. 1029 (September 12, 1969), 2 CCH Wages-Hours 41,983, Par. 30,581.

Petitioners are mindful of the heavy docket of this Court. However, we present to the Court a statutory interpretation question which goes to the marrow of the problem of the administrative arm of government seeking to legislate what Congress refused to do. Petitioners represent that they are aggrieved and need the protection and guidance of this Court.

CONCLUSION

The present case presents a serious misapplication of the law in an area of law where this Court should speak. This petition, therefore, should be granted.

Respectfully submitted,

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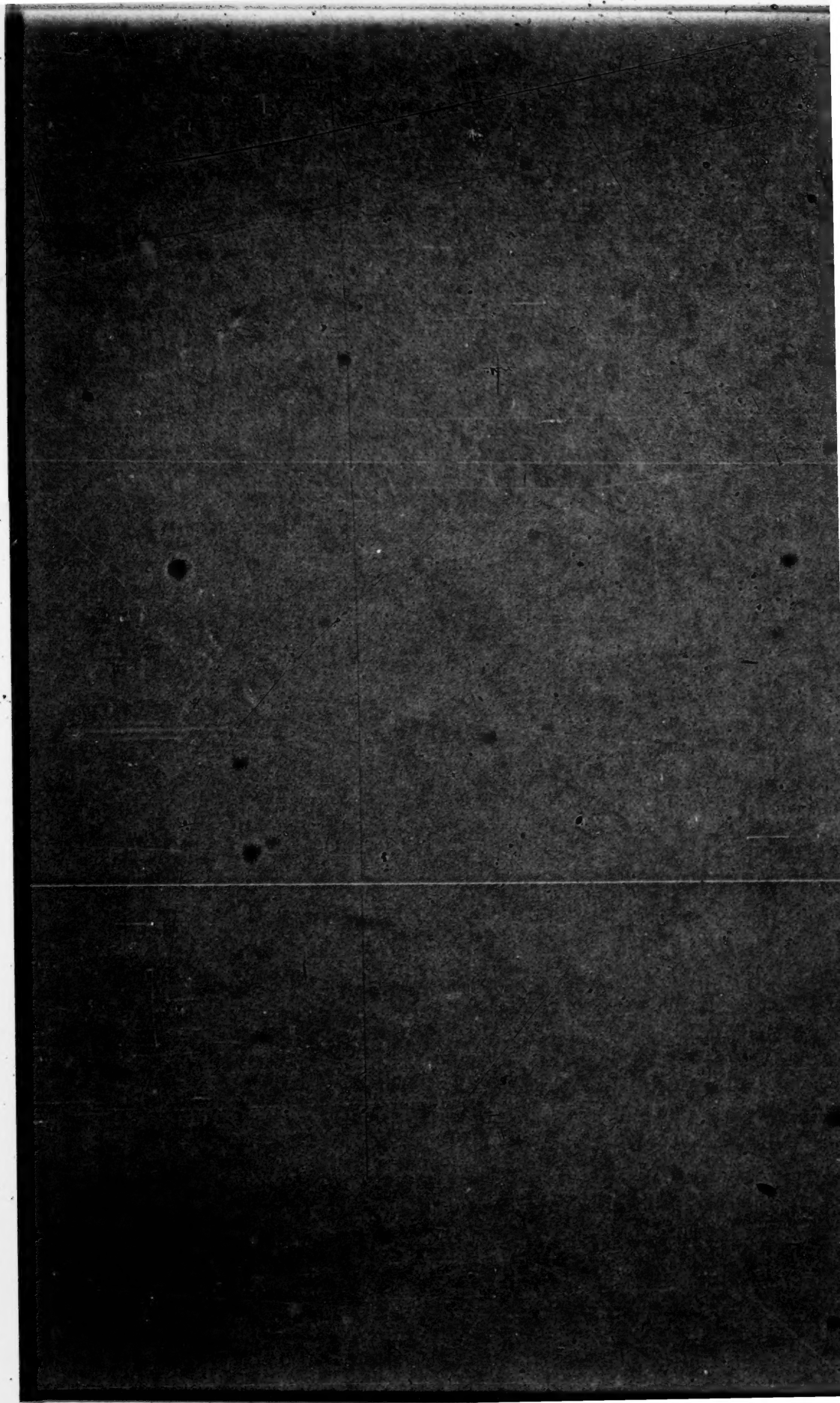
June 1, 1971



APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14, 572

George P. Shultz, Secretary of Labor,
United States Department of Labor,

Appellant,

versus

E. E. Falk, individually and as a partner in
Drucker and Falk, et als.,

Appellees.

Appeal from the United States District Court for the
Eastern District of Virginia, at Newport News.
Richard B. Kellam, District Judge.

(Argued January 8, 1971 Decided March 3, 1971.)

OPINION AND ORDER

WINTER, Circuit Judge:

The Secretary of Labor sued for an injunction under § 17 of the Fair Labor Standards Act, 29 U.S.C.A. §§ 201, *et seq,* to enjoin defendants from violating the minimum wage, overtime, and record-keeping provisions of the Act, and to restrain them from withholding back wages owed

to their employees. Defendants are copartners carrying on a building management business and the employees concerned are maintenance workers. The district court denied relief on the grounds that the defendants were not covered by the Act during the period in question because defendants' "annual gross volume of sales made or business done" was insufficient to effect coverage and because defendants' activities did not constitute an "enterprise." The district court also concluded that defendants were not the "employer" of the maintenance workers. We think otherwise and reverse.

—I—

Defendants manage approximately thirty apartment buildings located in various cities in Virginia. In addition they engage in selling real estate and insurance. Their real estate management is carried on under contracts with the owners, some of whom are nonresidents of Virginia. Defendants advertise the availability of apartments for rent; sign, renew and cancel leases; collect rents, initiate, prosecute and settle all legal proceedings for eviction, possession of the premises and unpaid rent; make repairs and alterations; negotiate contracts for electricity, gas, fuel, water, telephone services, window cleaning, rubbish removal, repair work and other services; purchase supplies; pay all bills, including mortgage payments; prepare an operating budget for the owner's review and approval; submit periodic reports to the owner; and hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises. The contracts are for specified periods, not less than a year. The owner is made responsible for all expenses except those wrongfully incurred by defendants, and the defendants hold the rent money in trust

for the owner, pay expenses out of it, and periodically remit the excess to the owner. Any excess of expenses over rents collected must be made up by the owner. As payment for their services, defendants receive a fixed percentage of gross rent receipts.[1]

To carry out their contractual management duties, defendants employ various management employees, including six area managers, and various clerical employees and rental agents, all of whom are admitted by defendants to be their employees. Defendants carry out the day-to-day operations of each project through a maintenance superintendent or project manager who is, under the supervision of the area manager, in charge of each project, and who hires, fires, and supervises the maintenance employees. Each project manager and his maintenance employees are characterized in the contract between defendants and the owner as employees of the owner, although defendants hire and fire them, promote them and make out their paychecks, for which they are reimbursed by the owners. The owners do not appear to exercise any supervisory power over the maintenance workers beyond approval or disapproval of the overall budget. The owners inspect their projects but direct their suggestions to the defendants. Occasionally, but only rarely, defendants have transferred maintenance personnel from one project to another; in each case, this was done with the knowledge of the owners. Defendants employ some maintenance personnel to work on two projects with different owners.

The owners are not parties to this suit. We are told that, viewed separately, the gross rental income of each project except one, is too small for it to be covered by the Act.

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[1] The size of these commissions does not appear in the record, but two sample contracts were included in the stipulation of facts. One of these provided for a 4% commission and the other for a 6%.

— II —

The Secretary's complaint, filed in 1969, charged defendants with failing to pay the wages and keep the records required by the Act. The Fair Labor Standards Act requires covered employers to pay their employees a minimum wage of $1.60 an hour, with various exceptions, including lower rates for employees newly brought under the Act by the 1966 Amendments.[2] There is a time-and-a-half pay requirement for work beyond forty hours a week, with similar

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[2] 29 U.S.C.A. § 206 provides in part:

> (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:
>
> (1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 and not less than $1.60 an hour thereafter, except as otherwise provided in this section:
>
> * * *
>
> (b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a) (5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, wages at the following rates:
>
> (1) not less than $1 an hour during the first year from the effective date of such amendments,
>
> (2) not less than $1.15 an hour during the second year from such date,
>
> (3) not less than $1.30 an hour during the third year from such date,
>
> (4) not less than $1.45 an hour during the fourth year from such date, and
>
> (5) not less than $1.60 an hour thereafter.

exceptions for employees recently covered.[3] Relevant record-keeping provisions are also set forth in the margin.[4]

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[3] 29 U.S.C.A. § 207 provides in part:

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[4] 29 U.S.C.A. § 211 provides in part:

§ 211. Investigations, inspections, records, and homework regulations

* * *

(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

In the district court, defendants did not contend that the employees received these levels of pay, but denied that the Act applied, arguing that the coverage conditions of the Act were not satisfied. Defendants argued there and before us that they were not the "employer" of the workers at the apartment buildings within the meaning of the Act, and that their business was not an "enterprise" as required for application of the Act. In addition, they argued that their annual gross volume of sales was less than that required for application of the Act, and that they did not have "employees engaged in commerce."

The district court found for the defendants on the grounds that their annual volume of sales was insufficient, holding that the rents collected by defendants could not be included in gross sales. The court also expressed doubt that defendants were an "enterprise" within the meaning of the Act, because they acted solely as agents for apartment owners. Because defendants were the owners' agents, the district court concluded that the maintenance employees were employees of the project and not employees of defendants.[5]

Because of the two-year statute of limitations, 29 U.S.C.A. § 255(a), we are hereby concerned solely with back wages during the period after January 30, 1967, two years before the filing of the complaint.[6] In 1966, the Act was amended in ways pertinent to this case, and the amendments took effect on February 1, 1967. Thus, the 1966 amendments were in effect during all the pay periods here at issue.

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[5] *Shultz* v. *Falk*, 312 F.S. 608 (E.D.Va. 1970).

[6] 29 U.S.C.A. § 255, as amended, provides a three-year statute of limitations for wilful violators. The complaint does not allege wilful violation.

— III —

First, we turn to defendants' contention that they are not the employers of the workers at the apartment projects. The Act states that " 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."[7] "Employee" is defined as including "any individual employed by an employer,"[8] and "Employ" is defined as including "to suffer or permit to work."[9] These definitions are very broadly cast, and the courts have accordingly found an employment relationship for purposes of the Act far more readily than would be dictated by common law doctrines. See, *e.g., Rutherford Food Corp.* v. *McComb,* 331 U.S. 722 (1945) (workers in slaughterhouse who removed bones from carcasses held to be employees of the slaughterhouse despite the fact that in some respects their operations were conducted like those of an independent contractor;) *Southern Ry. Co.* v. *Black,* 127 F.2d 280 (4 Cir. 1942) (redcaps in railroad station held employees of the railroad despite the fact that their compensation was solely derived from tipping;) *McComb* v. *Homeworkers' Handicraft Cooperative,* 176 F.2d 633 (4 Cir. 1949), *cert. den.,* 338 U.S. 900 (1949) (piece-workers who inserted draw strings in bags for bag manufacturers held employees of manufacturers despite the fact that their pay and work was distributed through a home-workers' cooperative.) Courts have also found that workers could have joint employers for purposes of the Act. See *Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F.2d 655

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[7] 29 U.S.C.A. § 203(d).

[8] 29 U.S.C.A. § 203(e).

[9] 29 U.S.C.A. § 203(g).

(10 Cir. 1942); *Durkin* v. *Waldron,* 130 F.S. 501 (W.D. La. 1955).[10]

The Second Circuit has held that rental agents may be employers, jointly with the building owners. In *Greenberg* v. *Arsenal Building Corp.,* 144 F.2d 292 (2 Cir. 1944) (per curiam), rev'd in part on other grounds, 324 U.S. 697 (1945), the Court held that a rental agent was properly found to be the employer of maintenance workers where the agent hired and supervised the workers, and paid them wages, for which it was reimbursed by the owners. The same result was reached in *Asselta* v. *149 Madison Avenue Corp.,* 65 F.S. 385 (S.D.N.Y. 1945), affirmed, 156 F.2d 139 (2 Cir.), *cert. den.,* 331 U.S. 199 (1946); in *Shultz* v. *Arnheim & Neely, Inc.,* ..... F.S. ..... (W.D. Pa. 1969), appeal docketed Nos. 18772-18774 (3 Cir.); and in *Shultz* v. *Isaac T. Cooke Co.,* ..... F.S. ..... (E.D.Mo. 1970).

It is true that building rental agencies are not as fully vested with the powers and benefits involved in being an employer as a company which owned as well as operated its buildings would be. Rental agencies, such as defendants here, are not solely responsible for the setting of wages, nor are they the sole beneficiaries of the underpayment of wages. But they may share a substantial part of these powers and benefits. Defendants either directly or indirectly hire, fire, and supervise the building workers. Within the limits of generalized and fairly long-term budgets, they set the wages of the building workers. Even the decisions behind budget allocations appear to be considerably influenced by defendants' recommendations, since defendants

[10] The possibility that the workers here may be jointly employed distinguishes *Wirtz* v. *Columbian Mutual Life Ins. Co.,* 246 F.S. 198 (W.D.Tenn. 1965), *aff'd.,* 380 F.2d 903 (6 Cir. 1967), relied on by the court below. In *Columbian Mutual,* service and custodial workers were held to be employees of the building owner. No building management company was a party.

are real estate management experts. We, therefore, have no doubt that defendants act "directly or indirectly in the interest of an employer in relation to an employee" and that the maintenance workers are "employees" of, and "employ[ed]" by, defendants within the statutory definition of the Act.

— IV —

Next, we consider defendants' contention that they are not an "enterprise" within the meaning of the Act, the operative wages and hours sections of which apply to employees "employed in an enterprise engaged in commerce or in the production of goods for commerce . . . ."[11]

"Enterprise" is defined in pertinent part as:[12]

> the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor . . . .

The district court's doubts as to whether defendants and the employees involved are part of an enterprise arose from the fact that the various apartment projects do not constitute a part of defendants' establishment. Similarly, before

[11] 29 U.S.C.A. §§ 206 and 207. These sections also apply to employees "engaged in commerce or in the production of goods for commerce" without regard to the enterprise requirement. The Secretary does not argue that the workers whose wages are at issue here are themselves engaged in commerce.

[12] 29 U.S.C.A. § 203(r).

us defendants have relied heavily on authorities indicating that use of common services will not readily be held to make several otherwise independent businesses part of the same enterprise. See, *e.g.*, Senate Report No. 145, 1961 U.S. Code Cong. and Admin. News 1620, 1661-62; *Wirtz* v. *Hardin & Co.*, 253 F.S. 579 (N.D. Ala. 1964), *aff'd.*, 359 F.2d 792 (5 Cir. 1965) (per curiam) (Piggly Wiggly grocery stores not part of the same enterprise where all they had in common was certain shareholders and contracts entitling them to use the Piggly Wiggly name.) The argument is that since each building is run by its owner for a different business purpose, they cannot all have a common business purpose.

This argument was rejected by the court in *Shultz* v. *Arnheim & Neely, Inc., supra,* and we agree. It is *defendants'* activities at each building which must be held together by a common business purpose, not all the activities of all owners of apartment projects. All that the enterprise requirement entails is that the defendants maintain under "common control" or as a "unified operation" a set of "related activities" having a "common business purpose," and that their employees be employed as a part of this operation. The organization and operation of defendants' apartment management business satisfy these requirements. Defendants supervise the employees involved here through a hierarchy terminating in their central offices. The services provided are substantially similar from project to project, and have the common purpose of maintaining and operating apartment buildings. The building workers are employed in this enterprise, since they are under defendants' control and carry out its purposes. The fact that they are employed at separate buildings does not prevent their being part of the same enterprise for purposes of the Act. See § 203(r),

supra; Shultz v. *Mack Farland & Sons Roofing Co.*, 413 F.2d 1296 (5 Cir. 1969) (two corporations engaged in the same business in different areas, but controlled by the same man, held to be a single enterprise); *Witrz* v. *Barnes Grocer Co.*, 398 F.2d 718 (8 Cir. 1968) (wholesale and retail grocery stores with substantially overlapping ownership held to be a single enterprise). Nor do we think that the building employees are removed from defendants' enterprise by the fact that some control over the employees may be exercised by the owners, or the fact that the employes' work under the contracts serves the owners' purposes as well as those of defendants. Defendants exercise substantial control and to a great extent their employees serve their common purposes and carry out related activities; this is enough to make them part of defendants' enterprise.

— V —

Next, defendants contend that their annual gross volume of sales was insufficient to bring them within the requirements of the Act. Defendants' answers to interrogatories established that gross rentals collected were approximately $7,700,000 in 1967 and $8,600,000 in 1968 and that gross commissions received were $434,000 in 1967 and $463,000 in 1968.

The Act defines an "[e]nterprise engaged in commerce or in the production of goods for commerce," *inter alia*, as one which:

> during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) . . . and beginning February 1, 1969, in an enterprise whose annual gross volume of sales or

> business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated) . . . .[13]

Thus, the issue is whether defendants met the $500,000 volume requirement during the period February 1, 1967, through January 31, 1969. it is not disputed that the $250,000 requirement for the period after February 1, 1969, was satisfied.

The government argues that the entirety of the rents collected should be included in defendants' gross sales and business done for purposes of the Act; defendants contend that only their commission should be counted. We agree with the government's contention.

Decided cases settle the proposition that rental of property constitutes a "sale" within the meaning of the Act's enterprise coverage provisions. *Wirtz* v. *Savannah Bank & Trust Co.*, 362 F.2d 857 (5 Cir. 1968); *Wirtz* v. *First National Bank and Trust Company*, 365 F.2d 641 (10 Cir. 1966); *Wirtz* v. *Columbian Mutual Life Insurance Company*, 380 F.2d 903 (6 Cir. 1967). This is so because "sell" is defined by the Act as including "any sale, exchange, consignment for sale, shipment for sale, *or other disposition.*" (emphasis supplied.)[14]

The district court avoided the thrust of this proposition by holding that when rentals, i.e., "sales," were made by defendants in their capacity as agents, the measure of their volume was not gross rents (as they would be had defendants owned the buildings) but gross commissions. There is no statutory support for this distinction, and it is contrary to decided cases. The Act speaks of "any" sale—a

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[13] 29 U.S.C.A. § 203(k).

[14] 29 U.S.C.A. § 213(a)(2).

characterization broad enough to include sales made in an agency capacity. The only exclusion from gross sales in the Act is for separately stated retail sales taxes. The legislative history indicates that, in fixing dollar volume tests, Congress was concerned not with an enterprise's income or profit but with its size and impact on commerce. S. Rep. 1487, 89 Cong., 2d Sess., pp. 7-8; 2 U.S. Cong. & Adm. News (1966) p. 3009. Defendants' impact on commerce would appear to be the gross volume of rents it collects, not just the amounts it is entitled to pocket. It was observed in *Wirtz* v. *First National Bank and Trust Company, supra,* 365 F.2d at 645, with regard to a management company that it "markets the property under its control by renting or leasing space to tenants. This is a 'disposition' within the statutory definition, and, we believe, conforms with the congressional intent to set a standard of size of those businesses which would be covered by the 1961 amendments."

In two cases directly in point, the Tenth and Fifth Circuits have held that the term "annual gross volume of sales" means "gross receipts" from all sales, whether made by one as agent for another or by one for his own account. *Wirtz* v. *First National Bank and Trust Company, supra; Wirtz* v. *Jernigan,* 405 F.2d 155 (5 Cir. 1968). The *First National Bank* case involved a management company which operated an office building owned by a bank. The management company had no ownership in the property and was accountable to the bank for the rentals paid to it by the tenants. Nonetheless, the court pointed out that it was the management company which "markets the property" and the court measured its "annual gross volume of sales made" by the amount of the rentals which it received rather than simply by the amounts which it deducted to cover its "management fee" and expenses.

In the *Jernigan* case, the defendant, a restaurant owner who also operated a Greyhound bus agency, argued that his annual "sales" from the bus agency were his commissions and not the ticket receipts which he transmitted to Greyhound. How sales of bus tickets should be measured was essential to a determination of whether Jernigan could avail himself of the retail establishment exemption of 29 U.S.C.A. § 213(a)(2), but the test for this exemption is the same as the test for application of the "enterprise coverage" provisions of the Act. The court held that the total proceeds from the ticket sales must be included in determining defendant's annual dollar volume of sales.

Two district court cases on facts virtually identical to those presented here have held "that gross rentals from defendant's [building] management activities must be included in determining its annual gross volume of sales made or business done." *Shultz* v. *Arnheim & Neely, Inc., supra,* ..... F.S. at .....; *Shultz* v. *Isaac T. Cooke Co., supra.*

In addition to judicial authority, the Wage-Hour Administrator has consistently ruled that the annual gross volume of a real estate management company is measured by the total rentals received from the building it operates. See Opinion Letter No. 182 (September 9, 1963), and No. 227 (January 31, 1964), 91 Wage and Hour Manual 1034c, 1024. See also, Opinon signed by the Administrator on September 28, 1967, 91 Wage and Hour Manual 1034g. As we have recently pointed out while "opinion letters are not binding on the courts they do constitute 'a body of experienced and informed judgment' which have been given considerable and in some cases decisive weight." *Shultz* v. *Hartin & Son, Inc.*, 428 F.2d 186, 191 (4 Cir. 1970).

Considering, therefore, the language of the Act, its legislative history and how it has been applied by other courts, as well as by the Wage-Hour Administrator, we conclude

that the gross rents received by defendants are the proper measure to determine whether they have met the $500,000 volume test in order to be an "enterprise engaged in commerce or in the production of goods for commerce" during the period February 1, 1967, through January 31, 1969. Defendants fall within the definition.

—VI—

Finally, defendants contend that they have no employees engaged in commerce. The enterprise concept embodied in 26 U.S.C.A. § 203(s) requires as part of the definition of "enterprise engaged in commerce" that there be "employees engaged in commerce or the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person." It is unnecessary for the employee to whom the Act is sought to be made applicable, himself, to be engaged in commerce; it is sufficient if another employee of the enterprise is so engaged. *Maryland v. Wirtz,* 392 U.S. 183 (1968).

The facts stipulated by the parties in the district court include stipulations that at least two of defendants' employees at their main office in Newport News, Virginia, have been engaged in handling, preparing, mailing or otherwise working on insurance policies or other materials for transmission across state lines to each of certain named insurance companies having their offices in Pennsylvania, New Jersey, Ohio and Rhode Island. It was also stipulated that, as a regular incident of their management of rental property, employees of the buildings managed by defendants repair plumbing, heating and air conditioning units, and that substantial portions of the materials used in these activities moved across state lines. Finally, it was stipulated

that, at each of three of the apartment houses managed by defendants, at least one employee has been regularly engaged in telephone and mail communications with the owners of the buildings across state lines concerning their operation. There can be no doubt that defendants do have employees engaged in commerce. *Cf., Maryland* v. *Wirtz, supra.*

The judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with the views expressed herein.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

NEWPORT NEWS DIVISION

Civil Action No. 12-69-NN.

GEORGE P. SHULTZ, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

E. E. FALK, Individually and as a partner in
Drucker & Faulk, et als.,
Defendants.

OPINION AND ORDER

The five individual defendants are partners engaged in business of "selling real estate and insurance and managing rental property." As a part of their activities, defendants manage or supervise numerous apartment projects under contracts with the owners. These contract rental payments "as received are deposited in an in and out account on behalf of the owner and expenses[1] are paid out of this account with the balance distributed immediately after receipt. Ownership remains with the owner and not the defendants and contractual arrangement is one of owner and rental

[1] Expenses of the project, but not of defendant.

agent."[2] All facts are stipulated, and no oral evidence was presented.

The management agreements between owners of the apartments and defendants refer to defendants as "Agent." Among other things, the agreement requires defendants to deposit the collected rents into a trust account, "separate from Agent's personal account," and Owner may require Agent to establish a separate trust account for the property. The agreement also conveys certain specific powers upon the Agent, namely to advertise the project, and make repairs and alterations. Owner agrees to hold and save Agent harmless and free from damages or injuries to persons or property, to carry liability insurance, and the agreement provides Agent is only liable for errors of judgment or mistake of fact or law if it constitutes willful misconduct or gross negligence.

The real issue is whether the gross rentals collected by defendants as Agents for the Owners of the various rental projects should be included on determining the "annual gross volume of sales made or business done." Plaintiff says yes, namely, that the total sum of all the rentals collected by defendants from the various rental projects for the Owners must be included in determining the annual gross volume of sales made or business done. Defendants say no, namely, that only the gross commissions which defendants receive from the Owners of the projects should be considered in determining the annual gross volume of sales made or business done; that the rents collected from each apartment project were the property of the Owner and only passed through defendants' hands as Agents. We are only concerned in this action with the period of February 1, 1967, through January 31, 1969, since it is agreed

[2] Stipulated in "Order on Final Pre-Trial Conference."

that even under the defendants' theory of accepting the gross commissions as the measure of the gross volume of sales made or business done as the true test, defendants after January 31, 1969, come within the economic test.

Title 29 § 203(s)(1) provides:

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
>
> (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated).

The Act was amended in 1961 and again in 1966. The principal purpose of the 1961 amendment was to incorporate into the Act the "enterprise" theory. It likewise appears that the 1966 amendment was to clarify and define rather than extend the "gross sales test" which had been included in the 1961 amendment. This very issue is dealt with in *Wirtz* v. *Columbian Mutual Life Insurance Com-*

pany, 380 F.2d 903, 908 (6th Cir. 1967), where the Court said:

> The economic test embodied in section 3(s)(3) was changed by the Fair Labor Standards Amendments of 1966 to read "annual gross volume of sales made *or business done*." (Emphasis added.) It is of course arguable that the purpose of the amendment was to extend coverage to enterprises which Congress had theretofore intentionally excluded by use of the narrowly defined gross sales test. However, Senate Report No. 1487, 89th Cong., 2d Sess., p. 7, U.S. Code Cong. & Admin. News 1966, p. 3002, provides:
>
> > "The phrase 'business done' has been added to the definition of 'enterprise engaged in commerce or in the production of goods for commerce' to reflect more clearly the intended meaning of the economic test of business size expressed in the present act in terms of 'annual gross volume of sales.' This test, as shown by Senate Report No. 145 * * * (and now judicially confirmed by the courts in Wirtz v. Sayannah Bank & Trust Company (C.A. 5, June 27, 1966) [362 F.2d 857] and Wirtz v. Columbian Mutual Life Insurance Company, 246 F. Supp. 198), [the instant case] is intended to measure the size of an enterprise for purposes of enterprise coverage in terms of the annual gross volume in dollars * * * of the business transactions which result from activities of the enterprise, regardless of whether such transactions are 'sales' in a technical sense."

Although this Report apparently goes beyond the decision herein in attributing a broad meaning to the

word "sale," it is clear that the purpose of the recent amendment was not to extend coverage but rather, to clarify the provision under consideration and to "remove any possible reason for misapprehension." It follows that the District Court correctly held that appellant's investment income should be included as part of its "annual gross volume of sales."

In this case there can be no question defendants do not own the apartment projects, nor do they control or operate them, except as Agent for the Owners; nor is the rent collected the property of defendants. These monies are to be deposited in a special trust account, and may only be comingled "in one trust account maintained by Agent for all or several clients or properties managed by Agent," [Def. Ex. 1] and Owner may even require Agent to maintain a special account for said fund. More than a debtor-creditor relationship exists. The sums to be distributed from said collections are controlled by the Owner. The rentals do not belong to defendants any more than the deposits of a bank belong to it, or the proceeds of a personal injury settlement made by a lawyer on behalf of his client belong to him, or the proceeds of a loan being closed by a lawyer for his client belong to the lawyer, or the proceeds of a sale of real estate made by an agent for his customer belong to the agent. Is a lawyer who represents a large estate and who on behalf of that estate handles the sale of stocks, bonds, real estate and other assets, collects and distributes the funds, to be charged with the gross sum collected and distributed as a part of "annual gross volume of sales made or business done?" In many places the lawyer's revenue license to do business is a tax computed on gross receipts.

Would the position of defendants be any different if the collections were deposited in a bank account in the name of

the Owner, and defendants were given authority to check on that account for the purpose of properly disbursing the funds? Or, would the situation be different if the funds were deposited in the name of Owner, and Owner drew a check to defendants for the commissions due defendants?

In *Wirtz* v. *Columbian Mutual Life Insurance Co.*, 246 F.Supp. 198 (W.D. Tenn. 1965), affirmed 380 F.2d 903 (6th Cir. 1967), the issue was whether investment income, including proceeds from sales or exchanges of stocks and bonds, interest, dividends, etc., should be included in gross sales. In determining that receipts from sales and exchanges of stocks and bonds should not be included, the Court said [246 F.Supp. 198, 204]:

> It appears to us, therefore, that we must choose between a literal application of the definition of a "sale" contained in Sec. 3(k) of the Act, and an interpretation of "annual gross volume of sales" contained in Sec. 3(s)(3) which would carry out the intention of Congress (1) that coverage depend upon the size of the business and (2) that receipts would be included which do not result from transactions that could be called a sale under the Sec. 3(k) definition. We conclude that the clear intention of Congress should prevail. Accordingly, we believe that receipts from these sales and exchanges of stocks and bonds should not be included. The fortuitous circumstance of the amount of sales or exchanges of stocks and bonds for reinvestment in a particular year would be little, if any, indication of the size of the business. Nor would, for example, the sale of the office building be such an indication. On the other hand, the amount of investment income, along with the amount of premium income, does indicate the size of a life insurance business.

In affirming the above decision, 380 F.2d 903 (6th Circuit 1967) at page 907, the Court of Appeals said:

> As the District Court noted, the legislative history of the Act reveals that "finance" companies, "whose income would certainly be interest," were intended to be embraced within the enterprise provisions of the 1961 amendments. Both the House and Senate Reports provide:
>
> > "This section [now 3(s)(3)] would provide minimum wage and overtime protection under the act for approximately 100,000 additional employees in such enterprises as wholesale trade, finance, insurance, real estate, transportation, communications, and public utilities, and business, accounting, and similar services."
>
> Senate Report p. 1650; House Report No. 75, 87th Cong., 1st Sess., p. 13. And, as indicated above, it has now been judicially established that banking enterprises are covered under the Act. While not suggesting that the operation of a bank is identical with the operating of an insurance company, it is difficult to perceive why income derived from a bank's investments should be counted as gross sales, while the investment income of an insurance company recognized as a major source of underwriters' revenue, would not similarly be included.

It is noted the term "income" is used in the determination of gross sales, and not the sale price of stocks, bonds, etc. And that Court continuing on page 908, said:

> Thus it is here determined that with respect to insurance companies as in the case of banks, where the in-

> vestment of money in various manners constitutes an integral and closely related aspect of the general overall business, and the income received from such investments constitutes a regular and substantial portion of such enterprises total annual income, investment income (whether denominated investment income or not) is properly includable within the enterprises "annual gross volume of sales" as that term is used in 3(s)(3).

In *Schmidt* v. *Randall,* 160 F.Supp. 228 (D.C. Minn. 1958), and *Mitchell* v. *Carratt, 160* F.Supp. 261 (S.D.Fla. 1956) the issue was whether the commissions from the sale of bus tickets retained by Schmidt, a hotel operator, and Carratt, a restaurant operator, as compensation for selling bus tickets for the bus line at their respective places of business or the total sales price of the tickets should be included in the gross receipts in determining the annual dollar volume of sales of goods or services. Each Court held that only the commissions received should be included, as opposed to the sales price of the tickets. To the contrary is the case of *Wirtz* v. *Jernigan,* 405 F.2d 155 (5th Cir. 1968). Defendants say that in *Jernigan* it was the owner of the "establishment" who was involved, while here defendants are not the owners of the various apartment projects.

If the Committee of Congress in preparing the amendments had intended that the sales price of all real estate sold by any real estate agent or broker or the total rental of any lease should be included in the term "annual gross volume of sales made or business done," it would have said so either directly or by example in reporting the Act to Congress for passage. It did consider the holding of the Court in *Wirtz* v. *Columbian Mutual Life Insurance Company,* 246 F.Supp. 198, referred to above, Senate Report

No. 1487, U.S. Code Congressional and Administrative News, 1966, Vol. 2, page 3002, at 3008, where at page 3009, it said:

> The phrase "business done" has been added to the definition of "enterprise engaged in commerce or in the production of goods for commerce" to reflect more clearly the intended meaning of the economic test of business size expressed in the present act in terms of "annual gross volume of sales."
>
> * * *
>
> The intent to measure the "dollar volume of sales or business" including "the gross receipts or gross business" in determining coverage of such an enterprise was expressed in the Senate report above cited at page 38. The addition of the term "business done" to the statutory language should make this intent abundantly plain for the future and remove any possible reason for misapprehension. The annual gross volume of sales made or business done by an enterprise, within the meaning of section 3(s), will thus continue to include both the gross dollar volume of the sales (as defined in sec. 3(k)) which it makes, as measured by the price paid by the purchaser for the property or services sold to him (exclusive of any excise taxes at the retail level which are separately stated), and the gross dollar volume of any other business activity in which the enterprise engages which can be similarly measured on a dollar basis. This would include, for example, such activity by an enterprise as making loans or renting or leasing property of any kind.

When it refers to "making loans or renting or leasing property of any kind" it refers to the Owner of the property

renting or leasing the same as was the case in *Wirtz* v. *Savannah Bank and Trust Company,* 362 F.2d 857, and *Wirtz* v. *Columbian Mutual, etc.,* 246 F.Supp. 198 [referred to in the Senate Report] and not the rental agent. In *Wirtz* v. *Columbian Mutual,* supra, the insurance company as owner of the building had a contract with an agent for management of the building [see 380 F.2d 903 at 905], leasing building spaces to tenants, collecting and transmitting the rents, etc. There the agent, subject to appellants approval hired the maintenance and custodial personnel of the building. There, contrary to the position here, the Secretary of Labor contended the maintenance and custodial personnel were employees of Columbian Mutual, rather than the rental agent.

Since the volume of business is one of the tests of whether a business is within the Act, it is difficult to believe Congress intended the measure of the size of the business to be the sum which passed through the business. That is, the total deposits of a bank, as opposed to its gross income; the total receipts of a brokerage firm from sale of properties of others on commission as opposed to the gross sum from sale of its services, its commissions; the total amount of a loan closed as opposed to the lawyer's gross fee; the sales price of real estate sold by a real estate agent or broker as opposed to his commissions. A real estate firm might act as agent for the sale of one parcel of land as a sales price of one million dollars in a year, with few other sales. Under the government's view, such a business, if the other requirements of the Act were met, would come within the Act.

The "gross volume of sales made or business done" is what is sold by the Agent, his services. He cannot sell for himself what is not his. What he sells of the owners he sells for the owners as the owners' agent. This then is the owner's sale. The owner corporation can only act through

agents. What would be different if one of the officers of the corporation—who as an officer is still an agent of the corporation—conducted the same activities as those conducted by defendants for the corporate owner.

While *Shultz* v. *Arnheim and Neely* (W.D. Pa. 1969), yet unreported, holds to the contrary, a reading of the background of the legislation and the briefs of counsel filed herein convinces me the better reasoning supports defendants.

Too, I am not convinced that defendants' activities constitute an enterprise within the meaning of the Act. Defendants are agents. Their activities in selling insurance, selling or renting of real estate, etc., are as agents for others. They operate one business. While they manage the various apartments, they do so as agents of the owners, and from their one establishment. The various apartment projects do not constitute separate establishments of defendants. They are but one part of the business of defendants one establishment. In keeping with *Wirtz* v. *Columbian Mutual*, supra, the managers, service employees, repairmen, etc., are employees of the project and not employees of the defendants.

Again referring to the legislative history, Senate Report No. 1487, U.S. Code Congressional and Administrative News 1966, Vol. 2, page 3002, at 3029, we find this language:

> In any case where a person other than the owner of an apartment building is engaged by the owner to perform management services in connection with the operation of the building, those individuals employed at and resident in the building as managers, caretakers, janitors, or in a similar capacity shall be considered for the purposes of this subsection employees of the building owner.

Further, one of the tests as to whether an enterprise exists by reason of defendants' activities at the various apartments is explained in the legislative history dealing with the 1961 amendment, Senate Report No. 145, U.S. Code Congressional and Administrative News 1961, Vol. 2, page 1620, at page 1661, where it is said:

> There may be a number of different types of arrangements established in such cases. The key in each case may be found in the answer to the question, "Who receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit?"

While the Court need not reach the issue of whether an injunction should be granted, it is appropriate to say that counsel for plaintiff in oral argument stated this was not a case where an injunction against future violations was necessary or appropriate.

For the reasons hereinabove set out, the relief sought is denied and the suit DISMISSED.

Richard B. Kellam
United States District Judge

Richmond, Virginia
January 16, 1970.

APPENDIX C

PERTINENT STATUTORY PROVISIONS

The pertinent provisions of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, as amended by the Fair Labor Standards Amendments of 1966, 80 Stat. 830, are set forth below, together with the language of Section 3(s)(3) as it read prior to the 1966 amendments (75 Stat. 65, 66):

[DEFINITIONS]

SEC. 3. As used in this Act—

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.

(e) "Employee" includes any individual employed by an employer * * *.

* * *

(g) "Employ" includes to suffer or permit to work.

* * *

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

* * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leas-

ing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor * * *.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated) * * *.

Prior to the 1966 Amendments, Section 3(s) read in pertinent part as follows:

SEC. 3(s) "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any reason:

* * *

(3) any establishment of any such enterprise except establishments and enterprises referred to in other paragraphs in this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000; * * *.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	7
Conclusion	16
Appendix	17

CITATIONS

Cases:

Childress v. *Earl Whitley Enterprises, Inc.*, 388 F.2d 742	10
Clifton D. Mayhew, Inc. v. *Wirtz*, 413 F.2d 658	10
Goldberg v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28	14
Greenberg v. *Arsenal Bldg. Corporation*, 144 F.2d 292, reversed in part on other grounds *sub nom. Brooklyn Bank* v. *O'Neil*, 324 U.S. 697	15
Herbert Harvey, Inc. v. *National Labor Relations Board*, 385 F.2d 684	15
Herbert Harvey, Inc. v. *National Labor Relations Board*, 424 F.2d 770	15
Kirschbaum v. *Walling*, 316 U.S. 517	14
Maryland v. *Wirtz*, 392 U.S. 183	12
Rutherford Food Corp. v. *McComb*, 331 U.S. 722	14, 15
Shultz v. *Arnheim & Neely, Inc.*, 324 F. Supp. 987	8
United States v. *Rosenwasser*, 323 U.S. 360	14, 15
Wirtz v. *Allen Green & Associates, Inc.*, 379 F.2d 198	13, 14
Wirtz v. *Barnes Grocer Company*, 398 F.2d 718	11

Cases—Continued

	Page
Wirtz v. *First National Bank and Trust Company*, 365 F.2d 641	13, 14
Wirtz v. *Hardin & Company*, 253 F. Supp. 579, affirmed *per curiam*, 359 F.2d 792	11
Wirtz v. *Jernigan*, 405 F.2d 155	13, 14
Wirtz v. *Melos Construction Corp.*, 408 F.2d 626	12

Statutes:

Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*:	
Section 3(k)	13
Section 3(r)	8-9, 10
Section 3(s)(1)	11, 12
Section 6(b)	3
Section 7(a)(2)	3
Section 11(c)	3
Section 13(a)(2)	13
Section 17	2-3

Miscellaneous:

H. Rep. No. 75, 87th Cong., 1st Sess.	10
S. Rep. No. 145, 87th Cong., 1st Sess.	9, 10, 13
S. Rep. No. 1487, 89th Cong., 2d Sess.	11, 13

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-225

E. E. FALK, ET AL., PETITIONERS

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1-16) is reported at 439 F.2d 340. The opinion of the district court (Pet. App. B, pp. 17-28) is reported at 312 F.Supp. 608.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1971. The petition for a writ of certio-

rari was filed on June 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' firm, which, as part of its general real estate brokerage and management business, operates and manages apartment house projects owned by various clients, performs "related activities * * * for a common business purpose" so as to constitute an "enterprise" within the meaning of Section 3(r) of the Fair Labor Standards Act.

2. Whether, for purposes of the Act's "enterprise" coverage provisions, the "annual gross volume of sales made or business done" by petitioners' building management activities should be determined by the total rentals received from the buildings which petitioners operate and manage, or by the commissions deducted from such gross receipts to pay petitioners' fees.

3. Whether petitioners' firm is an "employer", within the meaning of the Act, of the building maintenance workers whom it hires, fires, and supervises.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, are set forth in Appendix C of the petition, pp. 29-31.

STATEMENT

This suit was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act,

29 U.S.C. 217, to restrain petitioners from violating the Act's minimum wage (Section 6(b)), overtime (Section 7(a)(2)) and recordkeeping (Section 11(c)) provisions, and from continuing to withhold unpaid wages due to certain building maintenance employees. Petitioners stipulated the amounts that would be due under the Act's minimum wage and overtime provisions (A. 38, 44),[1] but denied that they were an "employer" of the maintenance workers or that they were an "enterprise" subject to the Act's requirements. The district court sustained these contentions and dismissed the complaint (Pet. App. B, pp. 17-28). The court of appeals reversed (Pet. App. A, pp. 1-16).

1. Petitioners, partners in the firm of Drucker & Falk, are engaged in various real estate brokerage and management activities, including the operation and management of some 30 apartment buildings located in various cities in Virginia (A. 16-19, 29, 85). These management activities are carried out under contracts with the building owners, which delegate to petitioners all of the functions required for leasing, maintaining, and operating the apartment buildings. Petitioners advertise the availability of apartments for rent;[2] sign, renew, and cancel leases; col-

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[1] "A." references are to the appendix filed with the court of appeals.

[2] A "typical" advertisement consists of a map showing the location of several projects, and containing the caption, "THAT'S US ALL OVER" and the name "DRUCKER & FALK" in large capital letters (A. 38, 75-76). Prospective

lect rents; institute, prosecute and settle all legal proceedings for eviction, possession of the premises, and unpaid rent; make repairs and alterations; negotiate contracts for electricity, gas, fuel, water, telephone service, window cleaning, rubbish removal, repair work, and other services; purchase supplies; pay all bills, including mortgage payments, etc.; prepare an operating budget for the owner's review and approval, and submit periodic reports to the owner; and hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises (A. 77-80, 86-87, 97-100, 105-108). The participation of the building owners, some of whom reside outside the State, is limited to their review and approval of the budgets prepared by petitioners and periodic visits to their buildings (A. 90-91).

Petitioners conduct these building management activities from their main office in Newport News, under the direction and control of their "management department." This department is staffed by an Executive Director, who has overall responsibility for the operation and management of the 30 apartment buildings, an Assistant Executive Director, and six area managers, who are each responsible for one or more of the buildings (A. 31, 88). These individuals are admittedly employees of the petitioners (A. 35). Other admitted employees are the rental

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tenants are directed either to the partnership's main offices in Newport News, or to "Drucker & Falk" at the apartment location (A. 76).

agents and clerical personnel hired to operate the rental offices, collect and deposit rents, take tenant complaints, maintain office records, and transmit receipts and other information to petitioners' central office (A. 88-89).[3]

In addition to these employees, petitioners assign a maintenance superintendent or project manager to each building or building complex. These superintendents are hired by petitioners and work under the direct control of the six area managers in petitioners' central office (A. 38, 89). Subject to petitioners' approval, the superintendents hire, fire, and supervise the maintenance employees necessary for the operation of the project to which they are assigned (A. 87, 91). More than 100 superintendents and maintenance workers are required to operate the 30 buildings managed by petitioners, and it is their wages which are the subject of this action (A. 31-35, 45-74). Although these workers are labelled by the contracts as "employees of the project owner[s]" (A. 85, 87, 99-100, 108), they are hired by petitioners, either directly or indirectly, and they "look to the [petitioners] for supervision and direction" (A. 92). It is petitioners who establish their hours and wages, acting within the limits of the budgets they prepare for each owner (A. 87); petitioners also arrange for transfers and promotions (A. 92).

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[3] Although there were some instances in which these employees were carried on the payroll of the building owner, they were nonetheless supervised and paid by the partnership (A. 85, 87-88, 96, 105). In any event, none of these employees received wage payments which would be substandard under the Act.

Petitioners, under the name of Drucker & Falk as agent, pay all the expenses incurred in operating and maintaining the apartment projects, including the wages of the building service employees, from rent receipts deposited into local customer accounts (A. 86, 88-89). Rents from the several buildings managed by petitioners totalled $7,725,600.86 in 1967, and $8,607,086.04 in 1968 (A. 20). Payments are transmitted to the building owners on a periodic basis, after petitioners have deducted their commissions—which totalled $434,228.15 in 1967, and $462,757.50 in 1968—and paid the other expenses (A. 21). If disbursements are in excess of gross receipts, the owners are required to reimburse petitioners (A. 86).

2. The district court upheld petitioners' contention that their building management activities did not qualify as a covered "enterprise" within the meaning of the Act, stating that it was "not convinced" that the activities performed by petitioners at each of the separately owned buildings were "related activities performed * * * for a common business purpose" within the meaning of Section 3(r). Furthermore, the court held that these activities did not meet the $500,000 dollar-volume test prescribed by Section 3(s)(1), on the ground that petitioners' "annual dollar volume of sales made or business done" must be measured by their commissions, and not by gross rents received from the several buildings (Pet. App. B, pp. 18-28). The district court also agreed with petitioners that the building superintendents and other maintenance workers were "employees of the

project and not employees of the defendants [petitioners]" (Pet. App. B, pp. 27-28).

The court of appeals reversed on each of these issues (Pet. App. A). On the question whether petitioners' building management activities constitute an enterprise within the meaning of Section 3(r), the court concluded that petitioners "maintain under 'common control' or as a 'unified operation' a set of 'related activities' having a 'common business purpose'" (Pet. App. A, pp. 10-11). As to the dollar-volume test, the court, relying on decisions of the Fifth and Tenth Circuits and of another district court, concluded that "the term 'annual gross volume of sales' means 'gross receipts' from all sales, whether made by one as agent for another or by one for his own account" (Pet. App. A, pp. 12-15). Finally, on the employment issue, the court, referring to petitioners' supervisory powers, concluded that petitioners "act 'directly or indirectly in the interest of an employer in relation to an employee' and that the maintenance workers are 'employees' of, and 'employ[ed]' by defendants [petitioners] within the statutory definitions of the Act" (Pet. App. A, pp. 7-9).

ARGUMENT

We contend that the decision below, in all respects, correctly applies the provisions of the Fair Labor Standards Act and should be affirmed in the event of review by this Court. Since there is no conflict among the circuits on questions 2 and 3, further review of these two questions is unnecessary. However,

on question 1 (concerning application of the Act's "enterprise" coverage based on "related activities") a conflict has developed with the recent decision of the Court of Appeals for the Third Circuit in *Hodgson* v. *Arnheim and Neely, Inc.*, Nos. 18,772, 18,773, 18,774, decided June 15, 1971, which reversed the district court decision in *Shultz* v. *Arnheim and Neely, Inc.*, 324 F.Supp. 987 (W. D. Pa.), referred to in the petition (p. 6, n. 2).[4]

The divergent rulings of the court below and of the Third Circuit on question 1 relate to the proper construction of Section 3(r) of the Act's "enterprise" coverage provisions. The importance of this issue goes far beyond its applicability to the real estate industry; indeed, the Third Circuit's holding brings into question the basic interpretation of the "enterprise" coverage provisions which the Department of Labor has followed consistently since the Act's coverage was extended to "enterprise[s]" in 1961. Accordingly, unless the Third Circuit grants the Secretary's petition for *en banc* review, filed on August 16, 1971, and reverses the panel decision in *Arnheim and Neely*, we do not oppose the granting of a writ of certiorari limited to question 1.

1. Under Section 3(r), an "enterprise"

> means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities

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[4] The court of appeals' opinion in *Arnheim & Neely* is reproduced as an Appendix, *infra*.

> whether performed in one or more establishments or by one or more corporate or other organizational units * * *.

Petitioners' activities clearly meet these statutory requirements. First, as the court of appeals noted, the building management activities performed by petitioners "are substantially similar from project to project" (Pet. App. A, p. 10; see also S. Rep. No. 145, 87th Cong., 1st Sess., p. 41 (1961)), and are thus "related" within the meaning of Section 3(r). Moreover, since petitioners supervise their building management activities "through a hierarchy terminating in their central offices" (Pet. App. A, p. 10), these activities are performed through "unified operation or common control." Finally, as the court below recognized, these activities have "a common business purpose," since all are performed in furtherance of petitioners' managerial services. And even though petitioners act formally as agents for the building owners, their building management activities are part of their own separate business operation in which they are engaged as independent entrepreneurs.

Petitioners contend that because the building owners who have engaged their management services have no relationship to each other, petitioners' activities are not performed "through unified operation or common control" for petitioners' "common business purpose." This was also the basis for the Third Circuit's ruling in *Hodgson* v. *Arnheim and Neely, supra.* As did the Third Circuit, petitioners have focused on

the lack of a relationship between their clients and not, as required by Section 3(r), on the relationship of petitioners' own activities.

Section 3(r) contains no requirement that "enterprise" activities must be performed in establishments which are themselves related. Indeed, it is no more necessary for the several buildings where petitioners perform their management activities to be related, in order for the activities to qualify as an enterprise, than it is for the several buildings or job sites at which employees of a construction firm work. See, *e.g.*, *Clifton D. Mayhew, Inc.* v. *Wirtz*, 413 F.2d 658 (C.A. 4); *Childress* v. *Earl Whitley Enterprises, Inc.*, 388 F.2d 742 (C.A. 4). Petitioners' argument, if carried to its logical conclusion, would mean that sales to the customers of a retail store (or chain of stores) are not "related" unless the customers are tied together by a "common business purpose." Nothing in the statutory language or legislative history of Section 3(r) supports such a construction. On the contrary, Congress clearly intended to "provide minimum wage and overtime protection under the act for approximately 100,000 additional employees in such enterprises as wholesale trade, finance, insurance, real estate, transportation, communications, and public utilities, and business, accounting, and similar services" (S. Rep. No. 145, 87th Cong., 1st Sess., p. 31; H. Rep. No. 75, 87th Cong., 1st Sess., p. 13). This purpose could not be accomplished under petitioners' construction, since few service businesses which operate on the premises of others would ever

derive sufficient sales from a single customer to meet the dollar-volume test of Section 3(s)(1).[5]

Petitioners' reliance on *Wirtz* v. *Hardin & Company*, 253 F. Supp. 579 (N. D. Ala.), affirmed *per curiam*, 359 F.2d 792 (C.A. 5), is misplaced, since there the related activities were performed by several separate corporations and not, as in the instant case, by a single legal entity. As a result, it was necessary in the *Hardin* case to tie together several separately incorporated retail stores in order to establish enterprise coverage. In concluding that these corporations were not related for purposes of the Act, the district court relied on evidence that the stores were independently operated by local managers who made their own decisions and had "full authority and responsibility" over their employees (253 F. Supp. at 584-585). Moreover, Congress has expressed its disapproval of the narrow construction given in *Hardin* to Section 3(r). See S. Rep. No. 1487, 89th Cong., 2d Sess., p. 7. See also *Wirtz* v. *Barnes Grocer Company*, 398 F.2d 713, 721-722 (C.A. 8).

Contrary to petitioners' view of this case, the government has not sought to "bring the independent apartment owner[s] within the Act" (Pet. 6). None of them has been named as a party to this action, and the mere fact that some of petitioners' employees perform their activities on the premises of a building owner does not make that owner a covered employer

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[5] This would have been especially true when the 1961 amendments were passed, for the original dollar-volume provision (Section 3(s)(3)) set a minimum of $1,000,000.

except, of course, to the extent that he may be a joint employer of petitioners' employees (in which event his liability would be limited to jointly employed workers).

Petitioners contend that the Fourth Circuit's holding with respect to enterprise coverage contradicts this Court's statement in *Maryland* v. *Wirtz*, 392 U.S. 183, 188, that the "effect of the 1961 change was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not enlarge the class of *employers* subject to the Act" (Pet. 7). To the extent, however, that petitioners have employees traditionally covered by the Act (and they do, since they have employees who are regularly engaged in interstate telephone and mail communications (A. 28, 37)), petitioners are employers subject to the original Act. In any event, the legislative history of the Fair Labor Standards Amendments of 1961 and of 1966 shows that Congress intended to extend coverage to employers whose only connection with interstate commerce is that some of their employees "handle or otherwise work on goods that have been moved in or produced for commerce," even though these employers would not have been covered under the original Act. As the Second Circuit pointed out in *Wirtz* v. *Melos Construction Corp.*, 408 F.2d 626, where it based coverage on such "handling" activities, "[a] careful reading of the [*Maryland*] opinion shows * * * that this language is directed only at the portion of the [1961] amendment which brings about this particular extension of coverage. It is not directed to the

impact of the words concerning employees [handling or] working with goods that 'have been moved in * * * commerce * * *'" (*id.* at 628, n. 5).

2. There is no disagreement among the circuits on the "annual gross volume of sales" issue. All the courts of appeals which have considered this issue have held, as did the court below, that the term "annual gross volume of sales" means "gross receipts" from *all* sales, whether made in an agency capacity or for one's own account. *Hodgson* v. *Arnheim and Neely, Inc., supra; Wirtz* v. *First National Bank and Trust Company*, 365 F.2d 641, 643, 645 (C.A. 10); *Wirtz* v. *Jernigan*, 405 F.2d 155, 158-159 (C.A. 5).[6] Any other construction would be contrary to the Act's broad definition of "sales" and would frustrate the congressional intent that the dollar-volume test realistically measure the size of the enterprise and its impact on commerce (S. Rep. No. 1487, 89th Cong., 2d Sess., pp. 7-8; see also *First National Bank, supra*, 365 F.2d at 645; *Wirtz* v. *Allen Green & Associates, Inc.*, 379 F.2d 198, 199-200 (C.A. 6)).

Petitioners, like the management firms in *Arnheim and Neely* and *First National Bank*, and like the bus

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[6] Although the *Jernigan* case involved the retail establishment exemption of Section 13(a)(2), rather than the "enterprise * * * coverage" of Section 3(s), the application of both provisions depends upon the same definition of "sale" provided in Section 3(k) of the Act, and the Senate Report clearly states that gross sales should be measured in the same way for both provisions (S. Rep. No. 145, 87th Cong., 1st Sess., p. 38 (1961)).

agency in *Jernigan*, perform all the activities necessary to sell[7] or "[market] the property under [their] control" (*Wirtz* v. *First National Bank*, *supra*, 365 F.2d at 645). The fact that the property is owned by others does not reduce the magnitude of petitioners' marketing activities, nor does it diminish their impact on commerce. They, and not the building owners, purchase the supplies needed for the operation and maintenance of the 30 apartment buildings, including fuel, paint, plumbing and heating supplies, carpentry materials, etc.—substantial quantities of which originate from outside the state (A. 37, 87); negotiate contracts for water, gas, and electricity; and hire, supervise and pay more than one hundred maintenance, rental and clerical workers. Plainly, these activities will have the same "effect on the flow of men, money, and materials across state lines" (*Allen Green & Associates, Inc.*, *supra*, 379 F.2d at 200) as they would have if petitioners owned the buildings.

3. That the relationship of employer-employee exists between petitioners and the building maintenance workers, as the court below held, is settled by a long line of decisions by this and other courts (see, *e.g.*, *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722; *United States* v. *Rosenwasser*, 323 U.S. 360, 362; *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28), including a number which have held on facts virtually identical to those presented here that

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[7] In *Kirschbaum* v. *Walling*, 316 U.S. 517, 526, this Court recognized that leasing of property constitutes the "sale" of space.

building maintenance companies are "employers" of the maintenance employees they engage to work in the buildings they manage. See *Hodgson* v. *Arnheim and Neely, Inc., supra; Greenberg* v. *Arsenal Bldg. Corporation*, 144 F.2d 292, 294 (C.A. 2), reversed in part on other grounds *sub nom. Brooklyn Bank* v. *O'Neil*, 324 U.S. 697; *Herbert Harvey, Inc.* v. *National Labor Relations Board*, 385 F.2d 684, 685-686 (C.A. D.C.); *Herbert Harvey, Inc.* v. *National Labor Relations Board*, 424 F.2d 770, 774 (C.A. D.C.).

Petitioners concede that all the common law tests for determining the master-servant relationship are met here, but they contend that the "economic reality" is otherwise. Petitioners' reliance on the "economic reality" test (Pet. 7) is misplaced. That test does not impose stricter standards than the common law control test, as petitioners apparently believe. On the contrary, it was fashioned and developed by this Court for the social legislation of the 1930's, including the Fair Labor Standards Act, which defined the employment relationship in much "broader or more comprehensive" terms than at common law (*Rosenwasser, supra*, 323 U.S. at 362). As the Court explained in *Rutherford, supra*, the "economic reality" test is designed to bring within, rather than exclude from, such legislation "persons and working relationships which, prior to this Act, were not deemed to fall within the employer-employee category" (331 U.S. at 729). Here, the employer-employee relationship exists under common law tests; there is, accord-

ingly, no need to resort to the "economic reality" test.

CONCLUSION

There is no reason for further review of the court of appeals' holdings on the "annual gross volume of sales" and the employment issues (questions 2 and 3). We suggest, however, that the Court's consideration of the petition await disposition by the Court of Appeals for the Third Circuit of the Secretary's petition for rehearing in *Arnheim and Neely, supra.* If the conflict between the Third and Fourth Circuits concerning the proper construction of Section 3(r) —which is basic to the Act's "enterprise" coverage provisions—then persists, we would not oppose the granting of the petition for certiorari limited to question 1. If the conflict is eliminated upon further consideration by the Third Circuit, certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

BESSIE MARGOLIN,
Associate Solicitor of Labor,

CARIN ANN CLAUSS,
Attorney,
Department of Labor.

SEPTEMBER 1971.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,772, 18,773, 18,774

JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
APPELLANT IN NO. 18,772

v.

ARNHEIM AND NEELY, INC., a Corporation,
APPELLANT IN NO. 18,773

and

THE INSTITUTE OF REAL ESTATE MANAGEMENT
OF THE NATIONAL ASSOCIATION OF
REAL ESTATE BOARDS, INTERVENOR,
APPELLANT IN NO. 18,774

(D. C. Civil Action No. 67-1202)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued March 17, 1971
Before ADAMS and GIBBONS, *Circuit Judges*, and
WHIPPLE,* *District Judge*

OPINION OF THE COURT

(Filed June 15, 1971)

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* Of the New Jersey District Court sitting by designation.

ADAMS, *Circuit Judge.*

In this case, we are asked to decide whether a real estate management company which operates and maintains, but does not own, certain commercial buildings is an employer whose activities are regulated by the Fair Labor Standards Act as amended.

The Secretary of Labor sought an injunction in the District Court for the Western District of Pennsylvania under § 17 of the Fair Labor Standards Act, 29 U.S.C.A. § 201, *et seq.*, to enjoin Arnheim and Neely, Inc. (Company) for violating the minimum wage, overtime, and record keeping provisions of the Act, and to require the Company to pay back wages owed to the employees.

The District Court decided that from January, 1964 until February, 1967 the Company had not been subject to the Act's requirements, but thereafter, as a result of the 1966 amendments to the Act, the Company came within the enlarged scope of the Act, because the 1966 amendments reduced the economic criteria for coverage. Accordingly, the District Court granted the relief sought by the Secretary of Labor for the years following 1967 only. The Government appealed, and the Company filed a cross appeal.

The facts have been stipulated. The Company manages eight office buildings and one apartment complex located in the greater Pittsburgh area. The Company does not own these buildings except for a minor interest in one of them, but operates them under a management contract. Pursuant to the contract, the Company obtains tenants, negotiates and signs leases, institutes legal actions regarding these leases when necessary, alters and redecorates the buildings according to its own judgment, obtains utility contracts, and pays taxes and other bills relating to the proper-

ties. The Company collects the rent receipts for each building and deposits them in a separate bank account established for each building. The funds deposited in these accounts are the property of each building's owner, and expenses for each building are paid from the bank account established for that building. Any loss suffered in regard to a particular building is the loss of the owner of such building and not of the Company. Likewise, the profits belong to the respective owners of the buildings and not to the Company. Periodically, the Company withdraws the balance of funds having accrued in each account and forwards them to the respective owners.

The Company hires, discharges and supervises all employees necessary for the operation and maintenance of the buildings. Such employees include building superintendents and their assistants, cleaning ladies, custodians, watchmen, and elevator operators. Subject to the approval of the building's owner, the Company assigns each worker to his particular duties, fixes hours of work, and negotiates rates of pay and fringe benefits. In each building at least two employees operate elevators which carry postmen and messengers who deliver mail and packages to the building's tenants; a portion of such mail and packages originate from points outside of Pennsylvania. In one of the buildings, the Buhl Building, two employees personally deliver to tenants parcels, some of which originate outside of Pennsylvania. At another building, 319 Fifth Avenue, the elevator operators transport freight from the tenants, a portion to be delivered to points outside of Pennsylvania.

"Staff managers" employed by the Company maintain records relating to these buildings and submit periodic reports to the owners of each building. Some of the owners are located in states other than Penn-

sylvania. In 1964, the aggregate gross receipts from the nine buildings was approximately two million dollars, and from 1956 until the present the gross receipts have exceeded one million dollars per year.[1] The Company's commission has varied from year to year, but at no time has exceeded five hundred thousand dollars in any one year.

The Fair Labor Standards Act requires employers covered by the Act to pay their employees a fixed minimum wage,[2] forbids employers to require their employees to work more than a forty hour week unless they receive one and one half times their regular wages for such work, and mandates that records of wages and hours be maintained by the employers.

In reaching its ultimate conclusions regarding the scope of the Act's coverage before and after the 1966 amendments, the District Court made several subsid-

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[1] The gross receipts of each building during 1964 are stipulated:

Buhl Building	$ 93,537.62
Clark Building	800,902.10
Eureka Savings Building	71,873.24
Keenan Building	176,653.72
Martin Building	117,948.45
Pittsburgh Terminal Properties	285,225.57
University Square No. 1	277,848.02
Pittsburgh Life Building	54,307.00
Building 319 Fifth Avenue	57,190.00
	$1,935,485.72

[2] The basic minimum wage set by the Act has been increased by Congress several times during the periods relevant to this case:

From 1/4/64 until 1/31/67	$1.25
From 2/1/67 until 1/31/68	$1.40
From 2/1/68 until the present	$1.60

iary legal determinations. Each has been attacked, either by the Secretary or the Company.

I

The District Court decided that the Company, notwithstanding the fact that it was acting as an *agent* in hiring employees to maintain the buildings, was an "employer" as defined by the Act. In so deciding the District Court rejected the Company's contention that the term "employer" was to be given its common law or its traditional meaning. Instead, the Court applied the standard contained within the Act itself. The Act provides "that the term 'employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . ." 29 U.S.C.A. § 203(d). On its face the statute adopts a definition of the term "employer" broader than that of the common law, and applicable under the present facts to the Company. Thus, in Greenberg v. Arsenal Bldg. Corp., 50 F. Supp. 700 (S.D.N.Y. 1943), aff'd 144 F.2d 292 (2nd Cir. 1944), rev'd on other grounds *sub nom* Brooklyn Bank v. O'Neil, 324 U.S. 697 (1945), it was held that a real estate management company is an employer for purposes of the Act despite the agency relationship of the management company to owners of the managed buildings.

The fact that the owners of the buildings may also be considered "employers" as a result of their ultimate right to review policies and hiring practices followed by the Company does not preclude a finding that the Company is also an "employer." The Act contemplates the possibility of several simultaneous "employers" any one of which may be liable as an employer under the Act. Wirtz v. Herbert, 368 F.2d 139 (5th Cir. 1966): Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655 (10th Cir. 1942).

The Company argues that Bartels v. Birmingham, 332 U.S. 126 (1947), provides the applicable test—one of economic reality—to determine whether it is an "employer." As support for this contention, the Company stresses certain language of the *Bartels* opinion: "Obviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." 332 U.S. at 130. The District Court read this language in conjunction with United States v. Silk, 331 U.S. 704 (1947), decided a week before *Bartels*, which held that in social legislation the term "employer" was not to be given a restrictive common law construction. 331 U.S. at 712. Thus the Courts are required to avoid technical concepts of the employment relationship and are admonished to examine the economic realities presented by the facts of each case. Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961). Applying the "economic reality" test to the present facts, there can be no doubt of the appropriateness of treating the Company as an employer. The Company's business is that of maintaining and managing real property for the individual owners of such property. Such activity provides economic benefit to the Company's clients as well as to the Company itself. Unsatisfactory work will harm both the Company and the building owners. Since the Company hires these employees and provides the conditions of their employment, it appears that the Company is "acting directly or indirectly in the interest of an employer in relation to an employee." The District Court correctly decided that the Company was an "employer" of the various persons working at the buildings, as such term is defined by the Act.

II

A second test imposed by the Act concerns the "amount of gross volume of sales of [the] enterprise." 29 U.S.C.A. § 203(s)(3) before the 1966 Amendments; 29 U.S.C.A. § 203(s)(1) after the 1966 Amendments. The District Court, over the objections of the Company, decided that the economic test contained in the Act applied to the gross rental receipts of the buildings and not to the gross commissions earned by the Company. We agree with the District Court. The statute clearly refers to the gross sales of an "enterprise," [3] which term is defined as "related activities performed . . . by any person or persons for a common business purpose. . . ." § 203(s). Thus, in Wirtz v. Jernigan, 405 F.2d 155 (5th Cir. 1968), it was squarely held that in deciding whether the seller of bus tickets came within the Act's coverage, the gross dollar volume of ticket sales, *not* the seller's commission, was the appropriate indicia of coverage. Since rentals are sales within the meaning of the Act, Wirtz v. First National Bank and Trust Company, 365 F.2d 641 (10th Cir. 1966), it logically follows that the gross rentals of buildings managed by the Company, and not merely the Company's commissions are to be considered in applying the Act.

III

Although the Company is an "employer" within the meaning of the Act, and the gross rentals rather

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[3] Before the 1966 Amendments the Act referred to gross sales of any "establishment" of an "enterprise." Thus, prior to the effective dates of the 1966 amendments, it is clear that the gross rentals of each building would have to be considered separately in applying the Act's economic test.

than the gross commissions govern, we think the District Court erred when it aggregated the rental income of all nine buildings in applying one of the Act's criteria for coverage, the economic test. In addition to the "employer" requirement of the Act, before the 1966 amendments section 203(s)(3) set forth an economic test which limits the Act's coverage to certain businesses enjoying an annual gross volume of sales over one million dollars. The 1966 amendments expanded the Act's coverage by lowering the economic requirement to $500,000 during the period February 1, 1967 through January 31, 1969, and thereafter to $250,000. The legislative history of the Act makes it abundantly clear that the purpose of providing coverage to those companies with a minimum amount of gross sales was to avoid economic dislocation. The Senate Report accompanying the 1961 Amendments to the Act specifies:

> "The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under the law. (emphasis added) 1961 U.S. Code Cong. & Admin. News 1620, 1624.

Since the economic criteria of the Act is based upon a legislative judgment that only businesses which have attained a substantial gross volume of sales should be covered because of their presumed economic capacity to pay a prescribed minimum wage, apparently Congress feared that there might be undesirable economic consequences to small or inefficient

businesses if they were brought within the scope of the Act.

The Company here did not benefit, except as to its commission, as a result of the aggregate gross volume of rentals accruing from all nine buildings. Instead it acted solely in an agency capacity on behalf of each of nine separate and distinct businesses. The facts stipulated in this regard are that the rentals collected by the Company are deposited *in separate bank accounts for each owner*, and such funds are the property of the respective owners of the buildings. Any economic loss suffered in connection with a particular building is that of the owner. Similarly any profit enjoyed belongs to the individual building's owner. While as an agent the Company is liable as an "employer" to adhere to the strictures of the Act, nevertheless such vicarious responsibility does not require that the gross rentals of each of the Company's principals be pooled together merely because each principal has employed the Company as an agent.

The District Court reasoned that since the Company "is in the 'business' of managing the buildings' janitorial services, . . . each building becomes one of [the Company's] 'places of business.'" The analysis employed by the court below has been directly adopted by the Fourth Circuit in Shultz v. Falk, No. 14,572 (filed March 3, 1971). However, the Act requires that before separate establishments be deemed part of an enterprise, they first must be found to be "related activities performed . . . for a common business purpose. . . ." The owner of each of these buildings is not engaged in a business purpose common to all the other eight building owners merely because each employed a common agent. The record is devoid of any other evidence tending to demonstrate that the nine individual building owners have a "common

business purpose."[4] Were the buildings managed by their owners, the Government would not attempt to link them together as an enterprise bound together by a "common business purpose." The building owners' employment of the Company as rental agent does not alter this critical fact.

The legislative intent to exclude for purposes of the Act separate businesses which use common service organizations was made manifest in the Senate Report to the Fair Labor Standards Amendments of 1961, which adopted the "enterprise" concept (1961 U.S. Code Cong. & Admin. News 1620, 1660-1661):

> "The bill also contains provisions which should insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings.
>
> "The definition of 'enterprise' expressly makes it clear that a local retail or service establishment which is under independent ownership shall not be considered to be so operated and controlled as to be other than a separate enterprise because of a franchise, or group purchasing, or group advertising arrangement with other establishments or because the establishment leases premises from a person who also happens to lease permises to other retail or service establishments. For example, a retail establishement will not become part of an enterprise which operates a shopping center merely because it rents its establishment from the shopping center operator."

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[4] In Mitchell v. Hertzke, 234 F.2d 183 (10th Cir. 1956), the Court held that the Secretary of Labor has the burden of proof on this type of issue in this case.

If the record in this case revealed that the retention of the Company were accompanied by a change in the independent business purposes of the owners —for example facts such as the pooling of profits from the various buildings demonstrating a common business purpose—the result might be different. Here, however, the record reveals that the owners share no common purpose except the decision to hire the Company as their rental or management agent. As pointed out in Wirtz v. Hardin & Co., 253 F.S. 579 (N.D. Ala. 1964), aff'd 359 F.2d (5th Cir. 1965), the utilization of a common service does *not* by itself establish a common business purpose shared by the owners of separate businesses. Without more than here presented, we think the "enterprise" requirement of the Act has not been satisfied. It would be anomalous to treat the owners of commercial buildings as proprietors of individual businesses when they manage the buildings themselves and as participating in a "common business purpose" with other building owners merely because they hire a rental agent who manages other buildings.[5] This is particularly so in view of the expressed intent of Congress not to burden small businesses with a minimum wage they may not be able to afford. Therefore, we think the proper approach under the facts of this case is to consider each of the nine buildings separately.

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[5] It might also be considered anomalous that service employees hired by the management company might be paid different wages depending on the gross rentals of the particular building to which they were assigned. However, in view of the "common business response" requirement of the Act, we think the scale tips toward preventing inconsistent treatment of building owners who employ management companies as opposed to owners who manage their own buildings.

We do not reach additional questions posed on this appeal regarding whether the Company is engaged in interstate commerce as required by the Act, because viewing the gross rentals of each building separately it appears that in 1964 none of the buildings produced sufficient gross rentals to satisfy the Act's economic test. Since the stipulations of fact do not indicate the gross rentals of each building after 1964, we are unable to determine whether any one of the buildings alone satisfies the reduced criteria provided by the 1966 Amendments for coverage under the Act.

Accordingly, the order of the District Court will be reversed and the case remanded so that the Government may have the opportunity to introduce evidence regarding each buildings' gross rentals during the relevant years.

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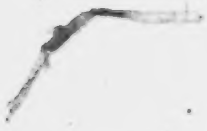

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